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Kok Peek Boon v AIA Bhd

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HIGH COURT (KUALA LUMPUR) — SUIT NO WA-22NCC-858–12 OF 2024
YUSRIN FAIDZ JC
21 JULY 2025

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Civil Procedure — Irregularity — Defective affidavits — Plaintiff applied to regularise defect in affidavit by reaffirming affidavit on grounds that it contained reference to post-affirmation event — Whether defect in affidavit amounted to mere irregularity that may be cured — Rules of Court 2012 O 41 r 4

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The plaintiff, a former insurance agent of the defendant, claimed wrongful termination and sought damages against the defendant. On 6 September 2024 where the pleadings were deemed closed, the defendant filed an amended defence and counterclaim ('encl 14'). However, the filing was rejected by the registrar due to formatting defects. The defendant then refiled encl 14 ('encl 17') on 18 September 2024. Prior to that, on 15 September 2024, the plaintiff affirmed an affidavit in support to be used in an application to disallow and/or strike out the defendant's encl 14 ('encl 19'). The plaintiff subsequently discovered the existence of encl 17 and thus added new averments concerning encl 17 into encl 19, an event that took place three days after encl 19 was affirmed. Supported by encl 19, the plaintiff filed an application ('encl 18') to disallow or strike out encl 14 and/or encl 17. The plaintiff hence filed this application seeking leave under O 41 r 4 of the Rules of Court 2012 ('the ROC') to regularise encl 19 by reaffirming the affidavit ('encl 25') on grounds that it contained reference to a post-affirmation event. The plaintiff argued, inter alia, that: (a) the defect was a genuine clerical mistake, not a deliberate attempt to mislead the court; and (b) the irregularity was technical and did not prejudice the defendant. In opposing encl 25, the defendant contended, inter alia, that: (i) the error in encl 19 was not a mere procedural lapse but a fundamental defect going to its substance; and (ii) there was a clear breach of O 41 r 5 of the ROC, which required affidavits to contain only facts within the deponent's personal knowledge. The issue for consideration was whether the defect in encl 19 amounted to a mere irregularity that may be cured under O 41 r 4 of the ROC.

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Held, allowing the application:

(1) The irregularity in encl 19 amounted to a procedural lapse rather than a substantive defect. The inclusion of information about events occurring after the affidavit's affirmation clearly resulted from an administrative

oversight rather than any intent to deceive. The plaintiff had offered a reasonable explanation for this error, a miscommunication with a temporary clerk, and had acted swiftly to rectify the situation by filing encl 25. The issue with encl 19 did not constitute a breach of O 41 r 5 of the ROC, which required that affidavits be confined to matters within the deponent's personal knowledge. Instead, it involved an addition or alteration to an affidavit which fell within the ambit of O 41 r 7 of the ROC, which was generally curable by having the affidavit re-sworn before it was filed. The mistake was purely clerical in nature. Further, the defendant's claim of prejudice remained unsubstantiated, particularly given the undisputed nature of the fact in question and the plaintiff's offer to remedy the defect. Enclosure 18, though contested, was in substance an interlocutory application that concerned with procedural compliance rather than the final adjudication of rights. Enclosure 19, though irregular in sequence, caused no prejudice to the defendant and was related to a matter that was clearly capable of being regularised. Although encl 19 referred to an event that had not occurred at the time of its affirmation, that event was now both certain and undisputed. To disallow the affidavit solely on this technical ground would permit procedural form to eclipse substantial justice (see paras 13–15, 17, 19 & 21–22).

[Bahasa Malaysia summary

Plaintif, seorang bekas ejen insurans defendan, menuntut penamatan salah dan ganti rugi terhadap defendan. Pada 6 September 2024, di mana pliding telah dianggap tutup, defendan memfailkan pembelaan dan tuntutan balas yang dipinda ('lampiran 14'). Namun, pemfailan itu ditolak oleh pendaftar kerana kecacatan format. Defendan kemudian memfailkan semula lampiran 14 ('lampiran 17') pada 18 September 2024. Sebelum itu, pada 15 September 2024, plaintif mengikrarkan afidavit sokongan untuk digunakan dalam permohonan untuk menolak dan/atau membatalkan lampiran 14 defendan ('lampiran 19'). Plaintif kemudiannya mendapati kewujudan lampiran 17 dan oleh itu menambah penegasan baharu berkaitan lampiran 17 ke dalam lampiran 19, suatu peristiwa yang berlaku tiga hari selepas lampiran 19 diikrarkan. Disokong oleh lampiran 19, plaintif memfailkan permohonan ('lampiran 18') untuk menolak atau membatalkan lampiran 14 dan/atau lampiran 17. Plaintif oleh itu memfailkan permohonan ini memohon kebenaran di bawah A 41 k 4 Kaedah-Kaedah Mahkamah 2012 ('KKM') untuk mengesahkan lampiran 19 dengan mengikrarkan semula afidavit itu ('lampiran 25') atas alasan ia mengandungi rujukan kepada peristiwa pasca-pengikraran. Plaintif berhujah, antara lain, bahawa: (a) kecacatan itu adalah kesilapan kerani yang benar, bukan percubaan sengaja untuk mengelirukan mahkamah; dan (b) ketidakaturan itu bersifat teknikal dan tidak memudaratkan defendan. Dalam menentang lampiran 25, defendan berpendapat, antara lain, bahawa: (i) kesilapan dalam lampiran 19 itu bukan

sekadar kesilapan prosedur tetapi kecacatan asas yang menyentuh intipatinya; dan (ii) terdapat pelanggaran jelas A 41 k 5 KKM, yang menghendaki afidavit hanya mengandungi fakta dalam pengetahuan peribadi pengikrarnya. Isu untuk pertimbangan adalah sama ada kecacatan dalam lampiran 19 merupakan ketidakaturan semata-mata yang boleh diperbetulkan di bawah A 41 k 4 KKM.

Diputuskan, membenarkan permohonan:

(1) Ketidakaturan dalam lampiran 19 merupakan kelalaian prosedur dan bukannya kecacatan substantif. Kemasukan maklumat mengenai peristiwa yang berlaku selepas pengikraran afidavit jelas berpunca daripada kecuaian pentadbiran dan bukannya niat untuk menipu. Plaintif telah memberikan penjelasan yang munasabah bagi kesilapan ini, iaitu salah komunikasi dengan kerani sementara, dan telah bertindak pantas untuk membetulkan keadaan dengan memfailkan lampiran 25. Isu dengan lampiran 19 tidak membentuk pelanggaran A 41 k 5 KKM, yang menghendaki afidavit terhad kepada perkara dalam pengetahuan peribadi pengikrarnya. Sebaliknya, ia melibatkan penambahan atau pengubahan pada afidavit yang termasuk dalam skop A 41 k 7 KKM, yang secara amnya boleh diperbetulkan dengan mengikrarkan semula afidavit sebelum ia difailkan. Kesilapan itu bersifat perkeranian semata-mata. Tambahan pula, tuntutan defendan mengenai prejudis kekal tidak berasas, terutamanya memandangkan sifat fakta yang tidak dipertikaikan dan tawaran plaintif untuk membetulkan kecacatan itu. Lampiran 18, walaupun dipertikaikan, pada dasarnya adalah permohonan interlokutori yang berkaitan dengan pematuhan prosedur bukannya penentuan hak muktamad. Lampiran 19, walaupun tidak teratur dari segi jujukan, tidak menyebabkan prejudis kepada defendan dan berkaitan dengan perkara yang jelas boleh disahkan. Walaupun lampiran 19 merujuk kepada peristiwa yang belum berlaku pada masa pengikrarnya, peristiwa itu kini adalah pasti dan tidak dipertikaikan. Untuk menolak afidavit itu semata-mata atas alasan teknikal ini akan membiarkan bentuk prosedur mengatasi keadilan substantif (lihat perenggan 13–15, 17, 19 & 21–22).]

Cases referred to

Doyle v Olby (Ironmongers) Ltd [1969] 2 QB 158, CA (refd)
Gilbert Engineering Co, Inc v Zainuddin bin Ahmad & Ors [2003] 6 MLJ 103, HC (refd)
Kordial Kor d/o Kundang Sing v EC Controlled Demolition Sdn Bhd & Ors [2002] 7 MLJ 386, HC (refd)
Redang Paradise Vacation Sdn Bhd v Yap Chuan Bin and other appeals [2017] 5 MLJ 35; [2017] 10 CLJ 296, CA (folld)

A *Yii Tue Yieng (f) v Lim Wai Keong* [2023] MLJU 407; [2023] 1 LNS 351, HC (refd)

Legislation referred to

B Rules of Court 2012 O 1A, O 20 rr 1, 3, 3(2)(b), 4, 5, O 41 rr 4, 5, 7

Lim Pang Kiat (with Fung Yu Qi) (Pang Kiat, Yu Qi Law Chambers) for the plaintiff.
Louise Jacqueline Azmi (with Latifa Haiqa bt Yusoff) (Skrine) for the defendant.

C **Yusrin Faidz JC:**

[1] Like a scene lifted from Steven Spielberg's *Minority Report,* where fate is sealed by *precogs'* premonitory glimpses of a future not yet lived, this case turns on an affidavit that appears to defy time itself. The plaintiff now seeks leave D under O 41 r 4 of the Rules of Court 2012 ('the Rules') to regularise this temporal anomaly by reaffirming the affidavit. The impugned paragraph refers to an event that took place three days after the affidavit was affirmed, as if the deponent had peered into the future. The defendant objects strenuously, insisting the defect is no mere slip but a fatal flaw that strikes at the heart of E admissibility. After careful scrutiny of the submissions and authorities, this court grants the plaintiff's application, for the reasons that follow.

BACKGROUND FACTS

F **[2]** The material facts are largely undisputed. The plaintiff, a former insurance agent of the defendant, claims wrongful termination and seeks damages exceeding RM322 billion. The defendant terminated her contract alleging participation in a fraudulent scheme involving 'premium financing', G namely the practice of paying insurance premiums on behalf of policyholders, often using third party funds, to generate policies that may later lapse, allowing agents to earn commissions without any genuine intention of maintaining the coverage. The plaintiff, however, denies these allegations and asserts that her termination was actuated by ulterior motives.

H **[3]** The procedural history unfolds as follows:

(a) on 3 July 2024, the plaintiff initiated the action by filing the writ and statement of claim (encls 1 and 2);

I (b) the defendant responded on 9 August 2024 with their defence and counterclaim (encl 5);

(c) on 22 August 2024, the plaintiff filed an amended writ and statement of claim pursuant to O 20 rr 1 and 3 of the Rules (encls 8 and 9). The amendments were confined to correcting the name of the first plaintiff

and updating the plaintiff's solicitor's particulars. However, the Registrar rejected these documents on 23 August 2024 due to formatting non-compliance;

(d) on 23 August 2024, the plaintiff filed their reply to defence and defence to counterclaim (encl 11);

(e) on 26 August 2024, the plaintiff refiled the amended writ and statement of claim under the same provisions (encls 12 and 13);

(f) pleadings were deemed closed on 6 September 2024;

(g) on 6 September 2024 at 11:58pm, the defendant filed an amended defence and counterclaim (encl 14) pursuant to O 20 r 3(2)(b). The amendments were substantial, replacing the original 37 paragraphs in encl 5 with a newly drafted 56-paragraph pleading. This filing was rejected by the Registrar on 9 September 2024 due to formatting defects;

(h) on 18 September 2024, the defendant refiled the amended pleading, now marked as encl 17;

(i) prior to that, on 15 September 2024, the plaintiff had affirmed an affidavit in support intended to be used in an application to disallow and/or strike out the defendant's amended defence and counterclaim in encl 14;

(j) the plaintiff subsequently discovered the existence of encl 17 during a routine check of the CMS system. At the material time, encl 17 had not been served on the plaintiff. As a result, the plaintiff added new averments concerning encl 17 into the affidavit that had already been affirmed on 15 September 2024;

(k) on 20 September 2024, the plaintiff filed an application under O 20 r 4 (encl 18) to disallow or strike out the defendant's amended defence and counterclaim (encls 14 and/or 17);

(l) the application in encl 18 is supported by the affidavit in support (encl 19), affirmed on 15 September 2024. As indicated above, the affidavit includes a factual assertion regarding the filing of encl 17, an event which occurred three days later;

(m) on 8 October 2024, the defendant filed an application (encl 21) seeking an extension of time and leave to regularise their amended defence and counterclaim; and

(n) on 13 October 2024, the plaintiff filed the present application (encl 25) to regularise the affidavit in support (encl 19) on grounds that it contained reference to a post-affirmation event.

[4] At their core, these interlocutory applications stemmed from the defendant's belated and procedurally defective attempts to amend their pleadings. After carefully evaluating the parties' submissions, I rendered the following decisions on 6 May 2025:

(a) the plaintiff's application in encl 25 to regularise the affidavit in support (encl 19) was allowed, with costs of RM2,000 payable by the plaintiff to the defendant; and

(b) following the defendant's solicitors' indication of their intention to file an application for a stay of proceedings to preserve the status quo pending appeal, the hearings for encls 18 and 21, which had been fixed for the same date, were vacated and adjourned for case management on 27 May 2025.

ISSUE

[5] The sole issue in respect of encl 25 is whether the defect in the plaintiff's affidavit in encl 19 amounts to a mere irregularity that may be cured under O 41 r 4 of the Rules.

COUNSELS' CONTENTIONS

The defendant's contentions

[6] Learned counsel for the defendant, Louise Jacqueline Azmi, mounted a strong opposition to the plaintiff's application in encl 25. She contended that the error in the affidavit was not a mere procedural lapse but a fundamental defect going to its substance. The crux of the defendant's argument was that the plaintiff's attestation to events which had not yet occurred at the time of affirmation undermined the very credibility and integrity of the affidavit.

[7] Counsel underscored that the irregularity pointed to one of two troubling possibilities: either the plaintiff had improperly affirmed a blank affidavit, or the affidavit was altered without authority after it had been affirmed. In either case, such conduct would amount to a clear breach of O 41 r 5 of the Rules, which requires that affidavits contain only facts within the deponent's personal knowledge. Order 41 r 5 is reproduced below:

> 5 Contents of affidavit (O 41 r 5)
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> (1) Subject to Order 14, rules 2(2) and 4(2), to paragraph (2) of this rule and to any order made under Order 38, rule 3, *an affidavit may contain only such facts as the deponent is able of his own knowledge to prove.*(Emphasis added.)

[8] Since the affidavit was affirmed on 15 September 2024, and encl 17 was only filed on 18 September 2024, it was, in counsel's submission, not possible for the plaintiff to have known of its existence at the time of affirmation.

[9] In advancing this position, learned counsel for the defendant relied upon *Kordial Kor d/o Kundang Sing v EC Controlled Demolition Sdn Bhd & Ors* [2002] 7 MLJ 386 (HC) per Abdul Malik Ishak J (as His Lordship then was) and *Gilbert Engineering Co, Inc v Zainuddin bin Ahmad & Ors* [2003] 6 MLJ 103 (HC) per Vincent Ng J (as His Lordship then was), which firmly establish the principle that defects going to the substance of an affidavit cannot be remedied through the curative provisions of O 41 r 4. The defendant's submissions culminated in a compelling policy argument, cautioning that to grant indulgence in such circumstances would set a dangerous precedent. It could invite abuse of the court's processes and erode the sanctity of sworn testimony.

The plaintiffs contentions

[10] The learned counsel for the plaintiff, Lim Pang Kiat argues that the defect was a genuine clerical mistake, not a deliberate attempt to mislead the court. The error was promptly admitted via a statutory declaration dated 9 October 2024 made by the said temporary clerk, and corrective steps were taken by filing the application to regularize the defect. Dilating on the issue, learned counsel for the plaintiff argues that the irregularity was technical and did not prejudice the defendant, as the fact averred ie the filing of encl 17 (re-filing of amended defence and counterclaim), was undisputed.

[11] Counsel submits that this court retains a discretionary power under O 41 r 4, O 1A, and O 2 r 1(3) of the Rules to cure procedural defects, where necessary to serve the ends of justice. Authorities such as *Yii Tue Yieng (f) v Lim Wai Keong* [2023] MLJU 407; [2023] 1 LNS 351 (HC) per Duncan Sikodol J; and *Redang Paradise Vacation Sdn Bhd v Yap Chuan Bin and other appeals* [2017] 5 MLJ 35; [2017] 10 CLJ 296 (CA) per Hamid Sultan Abu Backer JCA, is argued to support the proposition that courts should prioritise substantive justice over technical objections, particularly where no prejudice is shown.

COURT'S FINDINGS

[12] With regards to the discretion to be applied, the court is guided by O 1A, O 2 r 1 and O 41 r 4 of the Rules, all of which provides as follows:

> Regard shall be to justice (O 1A)
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> In administering these Rules, the Court or a Judge *shall have regard to the overriding*

interest of justice and not only to the technical non-compliance with these Rules.

1 Non-compliance with Rules (O 2 r 1)

(1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been non-compliance with the requirement of these Rules, the *non-compliance shall be treated as an irregularity and shall not nullify the proceedings,* any step taken in the proceedings, or any document, judgment or order therein.

4 *Use of defective affidavit* (O 41 r 4)

An affidavit may, with the leave of the Court, be filed or used in evidence *notwithstanding any irregularity in the form thereof*. (Emphasis added.)

[13] Having considered the affidavit evidence and the submissions of learned counsel on both sides, the court is of the view that the irregularity in the plaintiff's affidavit amounts to a procedural lapse rather than a substantive defect. Of particular relevance is the statutory declaration affirmed by the plaintiff's temporary clerk, which the court finds to be candid and persuasive (see exh A1 of encl 26). The pertinent extract of the statutory declaration is set out below:

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1. Saya adalah seorang kerani sementara kepada Tetuan YuQi & Associates yang beramal di No 1, Jlana Bawal Satu, Taman Seri Paya, 86000 Kluang, Johor.

2. Pada 08.10.2024, saya tealh ditunjuk oleh majikan saya tiga (3) affidavit secara khusus-nya perenggan 9 di dalam-nya seperti berikut:

   (a) *Affidavit Sokongan diikrarkan oleh Kok Peek Boon pada 15.09.2024 (Lampiran 19)* di bawah kes WA-22NCvC-429–07/2024

   (b) Afidavit Sokongan diikrarkan oleh Lee Kar Yun pada 15.09.2024 (Lampiran 19) di bawah kes WA-22NCvC-431–07/2024.

   (c) Affidavit Sokongan diikrarkan oleh Shum Ching Joo pada 15.09.2024 (Lampiran 19) di bawah kes WA-22NCvC-431–07/2024.

3. Saya menagkui bahawa *saya telah pada 19.09.2024 tersalah faham akan arahan majikan saya untuk membuat suatu 'afidavit tambahan' dengan 'tambahan kepada afidavit' dan secara tersilap menggantikan Perenggan 9 denagn memasukkan fakta-fakta pemfailan Lampiran 17 oleh Defendan-defendan para 18.09.2024 tanpa kesedaran kesan ke atas afidavit-afidavit tersebut yang telah diikrarkan pada 15.09.2024, sebelum pemfailan-nya pada 20.09.2024*.

4. Saya amat kesal terhadap kesilapan perkeranian tersebut dan dengan ini dengan rendah diri memohon ribuan maaf ke atas-nya yang todak disengajakan dan segala kesulitan amat dikesali ... (Empahsis added.)

[14] The inclusion of information about events occurring after the affidavit's affirmation clearly resulted from an administrative oversight rather than any intent to deceive. The plaintiff's solicitors have offered a reasonable explanation for this error, a miscommunication with a temporary clerk, and have acted swiftly to rectify the situation by filing encl 25.

[15] The court is of the view that the issue with the affidavit does not constitute a breach of O 41 r 5, which requires that affidavits be confined to matters within the deponent's personal knowledge. Instead, it involves an addition or alteration to the affidavit falling within the ambit of O 41 r 7, which is generally curable by having the affidavit re-sworn before it is filed. Order 41 r 7 is reproduced below:

> 7 Alterations in affidavit (O 41 r 7)
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> (1) *An affidavit which has* in the jurat or body thereof any interlineation, erasure or *other alteration shall not be filed or used in any proceeding without the leave of the Court* unless the person before whom the affidavit was sworn has initialled the alteration and, in the case of an erasure, has re-written in the margin of the affidavit any words or figures written on the erasure and has signed or initialled them.
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> (2) *An alteration shall not be made in any affidavit after it has been filed, but, before an affidavit is filed alterations may be made therein and the affidavit shall be re-sworn with a further jurat commencing with the word 're-sworn' added.* (Emphasis added.)

[16] In the circumstances, upon receiving instructions from the solicitors, the plaintiff's temporary clerk should have either prepared a supplementary affidavit or arrange for the deponent to attend before a commissioner for oaths to have the defective affidavit re-sworn.

[17] Importantly, the factual reference to the filing of encl 17 was not disputed between the parties and had no bearing on the substantive merits of the plaintiffs case. This stands in contrast to situations involving deliberately false or misleading statements in affidavits. Here, I am of the considered view that the mistake was purely clerical in nature.

[18] While the defendant has cited authorities dealing with deliberate falsifications, these are distinguishable from the present case where the error was clearly inadvertent. The court is guided by O 1A's directive to prioritise substantive justice over technical compliance, as held by Hamid Sultan Abu Backer JCA in *Redang Paradise Vacation Sdn Bhd v Yap Chuan Bin and other appeals*:

> [6] In the light of O 1A and O 2 of the RC 2012, *it is not an option anymore for the courts to strike out a matter for non-compliance of the rules without giving an opportunity to the litigant to regularise the proceedings or to condone the irregularity by the fiat of the court.* It is only in extremely rare cases where the non-compliance

A cannot be condoned at all, the court will be obliged to strike out the matter. Those are the cases where the respondent can demonstrate prejudice as well as can establish that the breach cannot be compensated by costs. (Emphasis added.)

B **[19]** The defendant's claim of prejudice remains unsubstantiated, particularly given the undisputed nature of the fact in question and the plaintiffs offer to remedy the defect. This approach aligns with the well-established judicial principle that parties should not suffer unduly for their lawyers' honest mistakes, as articulated by Lord Denning in *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158 (CA) at para 11:

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> ... *We never allow a client to suffer for the mistake of his Counsel if we can possibly help it*. We will always seek to rectify it as far as we can. We will correct it whenever we are able to do so without injustice to the other side ... (Emphasis added.)

D **[20]** The court further notes a degree of inconsistency in the defendant's strict reliance on procedural technicalities, particularly in light of their own procedural missteps. At all material times, their amended defence and counterclaim was filed outside the prescribed timeline and without the requisite leave under O 20 r 5 of the Rules. The defendant's failure to promptly serve encl 17 gave rise to an understandably reactive insertion of related facts into the plaintiff's affidavit in support of encl 18 after its affirmation. In any event, the notice of application in encl 18, for its part, makes plain that the plaintiff intended to challenge the validity of both encls 14 and 17.

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F **[21]** In this light, encl 18, though contested, is in substance an interlocutory application that concerns procedural compliance rather than the final adjudication of rights. The impugned affidavit, though irregular in sequence, causes no prejudice to the defendant and relates to a matter that is clearly capable of being regularised.

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[22] What the defendant characterises as a fatal temporal contradiction is more accurately understood through the concept of a bootstrap paradox or causal loop, as discussed by Novikov in *Evolution of the Universe* (1983), where an effect appears to precede its cause but still produces a coherent and consistent outcome. From the vantage point of a notional time traveller, what appears to be a temporal contradiction dissolves into an inevitable causal loop. On this footing, the court is of the view that although the affidavit refers to an event that had not occurred at the time of affirmation, that event is now both certain and undisputed. To disallow the affidavit solely on this technical ground would permit procedural form to eclipse substantive justice.

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DECISION

[23] For the reasons outlined above, the plaintiff's application in encl 25 to regularise the affidavit in support (encl 19) is allowed by having the said affidavit re-sworn. Costs of RM2,000 to be paid by the plaintiff to the defendant.

Application allowed.

Reported by Nabilah Syahida Abdullah Salleh